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No. 83-32

In The

# Supreme Court of the United States

October Term, 1983

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MCI COMMUNICATIONS CORPORATION and
MCI TELECOMMUNICATIONS CORPORATION,
*Petitioners,*

*v.*

AMERICAN TELEPHONE AND TELEGRAPH
COMPANY,
*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## BRIEF IN OPPOSITION

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HOWARD J. TRIENENS*
GEORGE L. SAUNDERS, JR.
THEODORE N. MILLER

One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

*Counsel for Respondent*

*Of Counsel:*

JIM G. KILPATRIC
RAYMOND BRENNER
SIDLEY & AUSTIN

Dated: August 10, 1983

*Counsel of Record

## QUESTIONS RESTATED

Whether this Court should review the Seventh Circuit's decisions on predatory pricing and damages where:

(1) the Seventh Circuit's holdings on these issues each rested on alternative grounds that applied the very standards MCI now advocates;

(2) there is no evidence in the record that AT&T's prices were below cost under any cost standard, including the very standard under which MCI's claim, and the jury verdict, were based; and

(3) there is no evidence in the record to support the critical premises of MCI's damages evidence and of the jury's $600 million damages award.

## STATEMENT REQUIRED BY RULE 28.1

In addition to wholly-owned subsidiaries, respondent American Telephone and Telegraph Company ("AT&T") has ownership interests in The Southern New England Telephone Company, Cincinnati Bell, Incorporated, and the Cuban American Telephone and Telegraph Company.

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## BRIEF IN OPPOSITION

Petitioners ("MCI") seek to have this Court review the decision of the Seventh Circuit and reinstate the $1.8 billion judgment which that court reversed and remanded for a new trial limited to damages on the remaining interconnection charges.[1] The predatory pricing and damages issues that MCI raises are manifestly inappropriate for review; the Seventh Circuit's holdings on each issue rested, in the alternative, on the ground that MCI's proof was inadequate even under the standards that MCI

[1] AT&T has filed a petition for certiorari in No. 83-21 raising the narrow but important question of whether the Court of Appeals correctly limited the remand to damages only from the remaining interconnection charges. Concurrently with this Opposition, AT&T is filing a cross-petition for certiorari raising the question whether the Seventh Circuit properly affirmed the jury's liability determinations on those interconnection charges.

now advocates. Furthermore, even the limited grounds of the Seventh Circuit's decision that MCI now challenges are consistent with the decisions of this Court and the many other courts of appeals that have addressed these same issues.

## COUNTERSTATEMENT OF THE CASE

MCI's petition seeks to convey the impression that it was the victim of an unforeseeable appellate decision that reversed the $1.8 billion judgment on a minor ground that may not have been a basis for the jury's verdict. This is false. MCI was guilty of a massive failure of proof; it did not present evidence at trial to support either the pricing or damages findings which the Seventh Circuit reversed. MCI seeks to gloss over this failure of proof and, in so doing, ignores that the liability charges were submitted to the jury under a special verdict containing separate questions on each of the fifteen separate charges.

MCI's complaint alleged a course of illegal monopolization by AT&T that consisted of 22 separate charges (App. 6a).[2] Seven were dismissed on directed verdict (App. 6a). Fifteen were submitted to the jury, and those fell principally into one of three categories: (1) a pattern of allegedly predatory pricing, including two of AT&T's private line tariffs, Telpak and Hi-Lo;[3] (2) the imposition of allegedly excessive prices for the interconnections AT&T provided; and (3) the imposition of allegedly unlawful restrictions upon MCI's rights to certain kinds of interconnections. MCI's "lost profits" study, upon which its damage claim was based, was

[2]"App." references are to the Appendix filed by MCI in No. 83-32, and "Pet." references are to MCI's Petition in No. 83-32. In addition, "Tr." references are to the trial transcript, "PX" references are to MCI's trial exhibits and "DX" references are to AT&T's trial exhibits.

[3]The Telpak tariff was filed by AT&T "in 1961 as a competitive response to the FCC's decision to permit large telephone users to construct and operate their own private microwave systems" and provided users,

*(Footnote continued on next page.)*

dependent upon MCI's proving the charges within each category. Thus, the study assumed (1) that MCI would have attained a much higher revenue level—$.85 per circuit mile per month—absent the alleged predatory pricing of Telpak and Hi-Lo; (2) that it would have incurred much lower costs, absent the alleged excessive prices for local interconnections; and (3) that it would have achieved a much greater volume of business, absent the alleged interconnection restrictions.

The jury found in AT&T's favor on five charges, including the charge that the Telpak tariff was predatory and the charge that the prices for local interconnections were unlawful (App. 236a-237a). The jury found in MCI's favor on two charges related to the Hi-Lo tariff and eight charges related to the interconnection disputes (*id.*). Having found for MCI on ten of the fifteen charges, the jury awarded MCI $600 million—exactly two-thirds of the $900 million claimed—which the District Court's judgment trebled to $1.8 billion (App. 238a).

**The Pricing Issues**

The jury was instructed that it could find Telpak or Hi-Lo to be predatory if it found that either tariff was priced below "the applicable cost" (App. 229a). However, the District Court instructed the jury that it was for them to decide "the appropriate cost standard" in applying that test (App. 228a-229a). In its special verdict, the jury selected "Average Costs (also called fully distributed or embedded costs)" as the "proper cost standard,"

*(Footnote continued from previous page.)*
such as the federal government, a substantial discount on large quantities of private line channels from the price that would have been paid if those channels were purchased individually (App. 17a-18a). The Hi-Lo tariff, which was first proposed in February 1973 and became effective in June 1974, "provided for the deaveraging of AT&T's individual private line service into two principal rate categories. Under Hi-Lo, AT&T would *lower* its rates on certain 'high density' long distance routes, many of which MCI planned to serve. At the same time, AT&T would increase its rates between so-called 'low-density cities', most of which MCI was not planning to serve" (App. 18a-19a). (Emphasis in original.)

rejecting "Marginal Costs (also called incremental or long-run incremental costs)" (App. 235a). The jury then found that Telpak was not predatory (App. 236a). Although MCI cross-appealed from the District Court's failure to instruct the jury on the structure of Telpak, it did not appeal from the jury's finding that Telpak was not predatory. The Seventh Circuit rejected MCI's cross-appeal and concluded "that Telpak was lawfully priced and marketed" (App. 42a). Because MCI's petition is not directed to the Telpak issues, the lawfulness of Telpak is unchallenged.

In the case of Hi-Lo, throughout most of the trial MCI did not contend or even attempt to present evidence that that tariff was priced below cost under any cost standard.[4] On the last day of its rebuttal case, MCI presented a one-page chart through its pricing expert (PX 3915) which purported to show some undefined "revenue deficiencies for AT&T's entire private line telephone service" (App. 72a). However, that chart did not relate to the reduced, high-density portion of Hi-Lo attacked by MCI[5] or even to the Hi-Lo tariff as a whole. Moreover, the underlying AT&T studies (DX 2002, DX 2003), upon which MCI's chart purported to be based, established that the Hi-Lo tariff was profitable even under the fully distributed cost methodologies advocated by MCI.[6] Thus, as the Court of Appeals held, MCI's chart was "defective for lack of specificity and explanation of key elements

[4]MCI took the position that it did not have to show below cost pricing, but, instead, that it could proceed on the theory that the tariff failed to "maximize" AT&T's profits (see App. 48a-49a). Only after the trial court rejected this unfounded "profit maximization" theory did MCI even attempt to fill the evidentiary void in the record.

[5]As the Seventh Circuit pointed out, the high-density portion of Hi-Lo was "the only portion of the long distance market in which AT&T lowered its price," and MCI's witnesses testified that "this decrease in the high density rates was AT&T's competitive response to MCI and, therefore, the only relevant price to be examined" (App. 72a n.62).

[6]Other studies in the record established that the Hi-Lo tariff was profitable and fully covered its costs determined under long-run incremental cost methods (DX 958, DX 2037, DX 2039).

and because 'private line telephone' is inadequately related to the high density portion of the Hi-Lo rate" (App. 75a).[7]

The jury's finding that Hi-Lo was predatory was accordingly reversed by the Seventh Circuit and judgment was rendered for AT&T on three alternative grounds: (1) the "erroneous instructions;" (2) the "use of an improper cost standard;" and (3) the "insufficiency of the evidence" (App. 42a).

**The Damages Issues**

MCI's "lost profits" study was also found inadequate by the Court of Appeals on alternative grounds: (1) the failure of MCI to prove that its claimed damages were caused by the unlawful acts of AT&T; and (2) the failure of MCI "to substantiate adequately the assumptions which provide the foundation for the study" (App. 149a).

On the first alternative, the Seventh Circuit found that MCI's "lost profits" study "was prepared . . . on the assumption that all of AT&T's actions" were unlawful and did not contain "any information that would permit the jury to adjust the damages in the event that AT&T were successful on any of the counts in the complaint" (App.145a-146a). Because a "major premise of the study, illegality of Telpak and Hi-Lo was incorrect," the court concluded that "the study must be rejected" (App.148a).

At trial, AT&T had demonstrated that the "lost profits" study's assumptions on revenues, costs and volume of business were unsupported. On the adequacy of those assumptions, the Seventh Circuit reasoned that while all the assumptions could be "questioned,"[8] the basis for the revenue assumption in particular was

[7]During oral argument before the Seventh Circuit, MCI's counsel conceded that its one-page chart (PX 3915) was "the *only* evidence" in the record upon which MCI relied to establish that Hi-Lo was priced below cost (Trans. of Arg., April 19, 1982, p. 122). (Emphasis supplied.)

[8]The jury's finding that the prices MCI was charged for local interconnections were reasonable undercut the cost assumption in its "lost

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"so lacking in substance that the lost profits study must be rejected as inherently untrustworthy and lacking in foundation" (App. 149a). The revenue assumption in MCI's "lost profits" study was based on the premise "'that Telpak would not be in existence'" (App. 149a). Indeed, Telpak was characterized by MCI's witnesses as creating a "stone wall" (Tr. 1909), which "carved out a significant portion of the intercity business market . . . to which competitors have only the remotest chance of getting any business at all" (Tr. 2397). In view of this testimony, the Court of Appeals concluded that "the most damaging piece of evidence concerning MCI's $.85 revenue assumption" is the fact that Telpak—"which the jury found to be lawful"—is "priced considerably lower than $.85" (App. 150a). Furthermore, the $.85 revenue assumption included revenue from services not approved until after the interconnection controversies ended, and thus the court held that there was "no rational basis" for concluding that MCI could have earned $.85 per circuit mile on the services at issue (App. 151a-152a).

The difference between MCI's actual revenues of $.63 per circuit mile per month and its assumed $.85 revenue level was so great that the Court of Appeals believed it to be "unlikely" that the few AT&T practices found unlawful could account "for realized revenues so far below the projected revenue figure" (App. 152a n.119). Nevertheless, the court remanded to allow MCI to prove the amount of damages, if any, it suffered as a result of the remaining liability findings.

## ARGUMENT

### I. The Seventh Circuit's Decision With Respect To Predatory Pricing Was Compelled By MCI's Failure Of Proof And Is Consistent With The Approach Of Other Circuits.

Contrary to MCI's claims, the rejection of its predatory pricing claims rested on three alternative grounds and thus did not

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profits" study, for "in fact, MCI has paid a higher charge than it assumed in its lost profits study" for those interconnections (App. 149a n.117). Similarly, the Seventh Circuit's reversal of the multipoint interconnection charge (App. 115a) undercut MCI's market assumption in its "lost profits" study.

depend upon the long-run incremental cost standard which MCI challenges in this Court. Without using the long-run incremental cost standard at all, the jury found against MCI on the Telpak pricing claims. With respect to Hi-Lo, in addition to the separate error in the trial court's instructions, the Seventh Circuit held that "MCI failed to produce sufficient evidence to create a jury question" even under the standards MCI now advocates. The court concluded that MCI had not shown that AT&T's prices were "below cost *under any standard*" including the fully distributed cost test urged by MCI below (App. 71a, 76a). (Emphasis in original.) Moreover, the court expressly acknowledged MCI's current claim that non-cost evidence of predatory intent should be admissible and that in some circumstances such evidence should be controlling (App. 46a & n.39, 66a & n.58); but found that in this case MCI "offered no credible direct evidence of intent" that could overcome the presumption of lawfulness that is created when prices are shown to be above cost (App. 67a & n.58). Thus, MCI misstates the evidence when it asserts that AT&T's prices "generated annual revenues many millions of dollars short of covering AT&T's costs" (Pet. at 4), and it mischaracterizes the Court of Appeals' decision when it states that the Seventh Circuit held "it was error to permit the jury to consider evidence of the defendant's actual intent in cutting prices" (Pet. at 6).

The pricing issue is an inappropriate one for the Supreme Court even apart from these alternative grounds for the Seventh Circuit's decision. MCI asserts that this Court's review is justified "to halt the disarray among the circuits" on the legal standard for judging predatory pricing claims (Pet. at 10).[9] But with respect to

[9]Underlying MCI's plea for the Court's intervention is the false premise that "[p]redatory pricing is a familiar economic occurrence" (Pet. at 8). To the contrary, there is "considerable evidence, derived from historical sources and from economic teaching, that predation is rare." *Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, 651 F.2d 76,

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the fundamental principles of the Seventh Circuit's decision, there is *no conflict* among the circuits.[10]

The legal standard applied by the Seventh Circuit for determining whether predatory intent could be inferred from AT&T's pricing practices is long-run incremental costs. The court reasoned that some objective cost-based criterion was necessary because there is no other "reliable" way "of distinguishing between pro- and anticompetitive price cuts by a monopolist" (App. 46a). Because long-run incremental cost is the accepted measure of "total *economic* costs" (App. 52a n.45, 56a), and because pricing at or above long-run incremental cost is a "rational and profitable business practice" (App. 66a), the court held that "no predatory intent should be presumed or inferred" from pricing above long-run incremental costs (App. 66a).[11]

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88 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). See also 3 P. Areeda & D. Turner, Antitrust Law, ¶ 711a, at 150-52 (1978); R. Bork, The Antitrust Paradox at 149-55 (1978); McGee, *Predatory Pricing Revisited*, 23 J.L. & Econ. 289, 290-300 (1980). What is a familiar occurrence, however, and what is involved here, are charges of predatory pricing that are calculated to obtain umbrella protection from genuine competition.

[10]Nor is the Seventh Circuit's holding inconsistent with the decisions of this Court in *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966), and *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911) (see Pet. at 8). While allegations of predatory pricing were made in those cases, the Court did not specifically consider the pricing issue in either case.

[11]MCI attempts to disparage the Seventh Circuit's analysis with the assertion that "the Seventh Circuit thought long-run incremental cost was a measure of average total cost, although both parties and the trial judge had treated it as a measure of marginal cost" (Pet. at 10). MCI is simply engaging in a play on words devoid of any substance. The Seventh Circuit explained with great care that long-run incremental costs represent the "average cost of adding the entire new service or product rather than merely the last unit of production" (App. 51a), and therefore that average total cost is "best measured in the multi-product context by *average long-run incremental cost*" (App. 66a). (Emphasis in original.) That is precisely the cost standard AT&T advocated at trial.

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Every court of appeals which has addressed the question in recent years has followed an approach similar to that of the Seventh Circuit. Thus, the other circuits have held that costs are an important, if not controlling, factor in evaluating predatory pricing charges,[12] and the other circuits have been "virtually unanimous in their endorsement" of some form of a marginal or incremental cost standard (App. 63a).[13] No court of appeals in recent history has upheld a predatory pricing charge in a Section 2 monopolization case without a finding of pricing below some

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Moreover, the court was at pains to explain why average total economic cost was not to be confused with fully distributed costs (App. 56a n.51)—the standard advocated by MCI. As the majority held, it rejected a fully distributed cost standard because it is not "economically relevant" and is "a quite arbitrary allocation of costs" and because "no court has ever adopted fully distributed cost as the appropriate cost standard in a predatory pricing case" (App. 53a-54a, 61a).

[12]See, *e.g.*, *Broadway Delivery Corp.* v. *United Parcel Service of America, Inc.*, 651 F.2d 122, 131 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981) ("plaintiffs could not demonstrate price predation by the defendants without proof permitting a careful assessment of the relationship between the defendants' prices and costs"); *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 723 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976) (court must examine "the relationship between . . . prices and costs in order to determine whether . . . price behavior was predatory"). See also *Southern Pacific Communications Co.* v. *American Tel. & Tel. Co.*, 556 F. Supp. 825, 919 (D.D.C. 1983), *appeal pending*, No. 83-1102 (D.C. Cir.) ("a showing of below-cost pricing has consistently been held to be an essential element of a plaintiff's *prima facie* case").

[13]See, *e.g.*, *Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, *supra*, 651 F.2d at 88 ("the relationship between a firm's prices and its marginal costs provides the best single determinant of predatory pricing"); *International Air Industries, Inc.* v. *American Excelsior Co.*, *supra*, 517 F.2d at 724 (pricing behavior "could [not] be deemed anticompetitive unless the monopolist set a price below its own marginal cost"); *Super-Turf, Inc.* v. *Monsanto Co.*, 660 F.2d 1275, 1281 (8th Cir. 1981) (even a monopolist is "within its rights to respond to the lower prices of its competitors while still pricing above its marginal costs"); *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976), *cert. denied*, 429 U.S.

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measure of cost; and there are numerous cases in which directed verdicts have been upheld where evidence of below cost pricing has been lacking.[14]

MCI has no basis for complaining about any differences between the Seventh Circuit's long-run incremental cost standard and the short-run marginal cost or average variable cost formulations of other circuits.[15] In the first place, the Seventh Circuit made it clear that it was not rejecting the application of different measures of incremental or marginal costs in appropriate circumstances (App. 60a-61a & n.54, 64a & n.56). Moreover, as the Court of Appeals explained, the long-run incremental cost standard imposes a more rigorous burden upon defendants than does a short-run test. A long-run incremental cost approach "measures

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1074 (1977) (failure to show defendant's prices "were below its marginal or average variable cost was a failure as a matter of law to present a prima facie case under § 2"); *Pacific Engineering & Production Co.* v. *Kerr-McGee Corp.*, 551 F.2d 790, 795-97 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977)("evidence of marginal cost . . . is extremely beneficial in establishing a case of monopolization through predatory pricing").

[14]See, *e.g.*, *Richter Concrete Corp.* v. *Hilltop Concrete Corp.*, 691 F.2d 818, 822 (6th Cir. 1982); *Chillicothe Sand & Gravel Co.* v. *Martin Marietta Corp.*, 615 F.2d 427, 432-34 (7th Cir. 1980); *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848, 858 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1979); *California Computer Products, Inc.* v. *IBM Corp.*, 613 F.2d 727, 743 (9th Cir. 1979).

[15]Focusing on the so-called *Areeda-Turner* test, and not on the Court of Appeals' decision in this case, MCI asserts that there is a "sharp disagreement" among the courts of appeals and that the Ninth Circuit in particular has rejected that test (Pet. at 9). In the decision under review, however, the Seventh Circuit pointed out with respect to the Ninth Circuit's decision in *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 58 (1982), on which MCI relies, that the "average total cost" standard of *Inglis* is "consistent with the use of long-run incremental cost" (App. 66a). Moreover, in the more recent decision in *Transamerica Computer Co.* v. *IBM Corp.*, 698 F.2d 1377, 1387 n.15 (9th Cir. 1983), on which MCI also relies, the Ninth Circuit specifically cited the Seventh Circuit's decision under review here as consistent with the standard applied in that case.

*all* the costs of adding a new product or service—'fixed' as well as variable costs" (App. 51a). Thus, a long-run incremental cost approach "assumes that *all* costs become variable in the long run," rendering inapplicable "a number of the criticisms leveled against the choice of a short-run marginal cost standard" (App. 52a). (Emphasis in original.)

MCI purportedly wants to eliminate the "pall of confusion and uncertainty" which it says exists in the predatory pricing area (Pet. at 10). The subjective intent standard which MCI apparently is proposing, however, is directly contrary to this stated objective. "[A] test based wholly on intent is unworkable," and it "invites the twin mischiefs of (1) burdening litigation with thousands of documents about the firm's motives and calculations; and (2) encouraging inconsistent and quixotic results" (App. 46a). More importantly, a subjective intent standard is fundamentally inconsistent with the goal of vigorous competition upon which the antitrust laws are founded because, as the court below found, "firms making pricing decisions in the presence of competition would be unable to ascertain what price reductions may be legally undertaken" (App. 47a).

By continuing to challenge prices that were above any measure of costs, MCI plainly is seeking "a price 'umbrella' under which less efficient firms could hide from the stresses and storms of competition." *Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, *supra*, 651 F.2d at 87. The Seventh Circuit's decision correctly recognizes that such a result would be inconsistent with the procompetitive thrust of the Sherman Act, and there is therefore no reason to re-examine that decision.

## II. The Seventh Circuit's Decision With Respect To Damages Was Compelled By MCI's Failure Of Proof And Is Consistent With The Decisions Of This Court And Other Courts.

The only evidence offered by MCI with respect to damages was its "lost profits" study which purported to calculate the difference between the revenues received by MCI, as damaged by the 22 al-

legedly exclusionary acts of AT&T charged in the complaint, and the revenues that could have been expected for an undamaged MCI (App. 140a). MCI chose to construct the study so that it would produce only a lump sum result and would "not establish any variation in the outcome depending on which acts of AT&T were held to be legal and which illegal" (App. 145a). However, of the 22 initial charges on which MCI's "lost profits" study was predicated, MCI prevailed on only six (App. 145a).[16]

One of the Court of Appeals' alternative holdings was that the damage award could not stand because "the jury was left with no way to adjust the amount of damages to reflect lawful competition from AT&T" (App. 146a). This was particularly important because the claimed illegality of "Telpak alone was apparently a major element of the injury giving rise to the damage award" (App. 147a). This "incorrect" assumption was "so critical to MCI's proof of damages" that "it would be unjust and contrary to the policies of the treble damage remedy to award MCI damages which may compensate it for the effects of such quantitatively significant *lawful* competition" (App. 147a, 148a). (Emphasis in original.)

MCI's failure to distinguish between lawful and unlawful conduct, however, was not the only ground on which the Court of Appeals rejected the "lost profits" study. In addition, the study was held to be fatally flawed because it was based on "inherently untrustworthy" and unfounded assumptions which deprived the jury of any "rational basis" upon which to assess damages (App. 149a, 151a-152a). As explained above, the revenue level that MCI assumed it would achieve in the absence of unlawful conduct by AT&T was particularly invalid because it was based in large part on the assumption that Telpak was predatory—an assumption the jury rejected and one as to which MCI chose not to appeal. Thus,

[16] A seventh charge was characterized by the court as merely an alternative formulation of another (App. 109a).

the damages issue as to which MCI seeks review was not determinative because the damage award was set aside on the wholly independent ground that critical assumptions underlying MCI's "lost profits" study were unsupported by evidence.

Ignoring this alternative holding, MCI asserts that the Seventh Circuit's decision should be reviewed because it is based upon a misinterpretation and unjustified extension of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (Pet. at 13-14). This alleged ground for review is wholly contrived. The Seventh Circuit cited *Brunswick* only in connection with the proposition that "an antitrust plaintiff must prove that his damages were caused by the *unlawful* acts of the defendant" (App. 141a). (Emphasis in original.) This proposition is hardly controversial; indeed, it is codified in Section 4 of the Clayton Act (15 U.S.C. §15) which allows treble-damage recovery only for injuries caused "by reason of anything *forbidden* in the antitrust laws" (emphasis supplied).[17]

Both before and after *Brunswick*, other courts consistently have reached the same result as the Seventh Circuit here.[18] In *Momand* v. *Universal Film Exchanges, Inc.*, 172 F.2d 37, 43 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949), the First Circuit held that where damages are predicated on a number of acts, many of which are found to be lawful, "the injury alleged must be

[17]See also *J. Truett Payne Co., Inc.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981) ("a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent"); *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 648 (1969) (plaintiff "must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered").

[18]There is no merit to MCI's assertion (Pet. at 14-15) that the Seventh Circuit's decision here is in conflict with the Fourth Circuit's interpretation of *Brunswick*. In both the Fourth Circuit cases cited by MCI, the issue was whether there was a sufficient causal link between the claimed injury and the alleged antitrust violation, not whether damages can be predicated on *lawful* competitive conduct.

allocated to the illegal practices in some manner that can be reasonably measured." In *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir. 1975), the Third Circuit reversed a jury verdict for plaintiff, stressing that because of the nature of plaintiff's evidence "the jury rationally could not have reduced these [damage] figures to reflect only losses due to unlawful competition" and that "in the absence of any guidance in the record, we cannot permit a jury to speculate concerning the amount of losses resulting from unlawful, as opposed to lawful, competition."[19]

Contrary to MCI's assertion, there is no inconsistency between requiring a plaintiff to prove that its injury was caused by the defendant's illegal acts and the rule that a plaintiff need not prove the amount of its damages with precision (see App. 142a). This Court has long recognized that "there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to fix the amount." *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931). See also *J. Truett Payne Co., Inc.* v. *Chrysler Motors Corp.*, *supra*, 451 U.S. at 567 & n.5. The Court has also held that injury may be inferred from a defendant's unlawful conduct only when the claimed damages are "not shown to be attributable to other causes." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946).

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[19] *Accord: Murphy Tugboat Co.* v. *Crowley*, 658 F.2d 1256, 1260-63 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); *ILC Peripherals Leasing Corp.* v. *IBM Corp.*, 458 F. Supp. 423, 434 (N.D. Cal. 1978), *aff'd per curiam sub nom. Memorex Corp.* v. *IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981); *Van Dyk Research Corp.* v. *Xerox Corp.*, 631 F.2d 251, 255 (3d Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *R.S.E., Inc.* v. *Pennsy Supply, Inc.*, 523 F. Supp. 954, 964-66 (M.D. Pa. 1981); *Transamerica Computer Co.* v. *IBM Corp.*, 481 F. Supp. 965, 1013 (N.D. Cal. 1979), *aff'd*, 698 F.2d 1377 (9th Cir. 1983); *Southern Pacific Communications Co.* v. *American Tel. & Tel. Co.*, *supra*, 556 F. Supp. at 1090-92.

Indeed, "[w]hen a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors" (App. 145a), the jury is forced to rely upon precisely the type of "speculation or guess work" that this Court has held is not permitted. 327 U.S. at 264.

Finally, MCI's claim that the Seventh Circuit's decision "will prevent ordinary jury trials" (Pet. at 15) is disingenuous at best, particularly where, as here, MCI was guilty of a massive failure of proof on the critical premises of its case. As the Seventh Circuit explained, the defect in MCI's evidence "might have been cured if MCI had offered evidence on the adjustment of the damage award to reflect findings of non-predation" (App. 148a-149a). But instead, MCI made the tactical decision to offer only its unsubstantiated "lost profits" study, thus leaving the jury with no way "to adjust the damages in the event that AT&T were successful" as to any of MCI's charges (App. 146a).[20] Having wagered this all-or-nothing gamble for a windfall damage award, MCI should not now be heard to complain, especially when the Court of Appeals has given it another chance to show on remand the amount of actual damages, if any, that it suffered from practices "forbidden in the antitrust laws."

[20]MCI's assertion that "separating the effects of AT&T's practices was not feasible" (Pet. at 5) is directly contrary to its admission in a post-trial memorandum that it "could have presented evidence of specific lost customers or specific increased labor and equipment costs," but chose not to do so because, as MCI put it, this approach "would have trivialized the harm done." MCI's Partial Response to Post-Trial Motions, July 10, 1980, p. 22.

## CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

HOWARD J. TRIENENS*
GEORGE L. SAUNDERS, JR.
THEODORE N. MILLER

One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

*Counsel for Respondent*

*Of Counsel:*

JIM G. KILPATRIC
RAYMOND BRENNER
SIDLEY & AUSTIN

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*Counsel of Record